BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DELVIN HUPFER	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,019
KANSAS BRICK & TILE COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and the respondent appealed Administrative Law Judge Bruce E. Moore's May 21, 1999, Award. The Appeals Board heard oral on October 13, 1999.

APPEARANCES

Claimant appeared by his attorney, Patrik W. Neustrom of Salina, Kansas. Respondent and its insurance carrier appeared by and through their attorney, C. Stanley Nelson of Salina, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

This is a claim for a low-back injury allegedly caused from 18 years of performing heavy work activities while employed by the respondent. The Administrative Law Judge denied claimant's claim for workers compensation benefits. The Administrative Law Judge found claimant's degenerative low-back condition was neither caused, accelerated, or aggravated from the 18 years of heavy work activities. The Administrative Law Judge further found the medical evidence did not prove claimant had suffered a personal injury

that arose out of and in the course of the employment. Additionally, because of a heart attack not associated with claimant's employment, claimant's date of accident did not occur until February 1997 when permanent restrictions were first imposed for the back. The Administrative Law Judge found, since claimant had a February 1997 date of accident, the accident could not have occurred in the course of the employment because claimant's last day worked was September 13, 1996. Furthermore, the Administrative Law Judge found claimant had failed to provide respondent with timely notice of accident within 10 days if the date of accident was claimant's last day worked of September 13, 1996. But the Administrative Law Judge found notice was given within 10 days if the accident date was February 1997.

On appeal, claimant contends he proved his heavy work activities over the 18 years he worked for the respondent had either caused, aggravated, or accelerated his degenerative low-back condition. Claimant argues he provided respondent with timely notice of accident and further respondent had actual knowledge that he was suffering a back injury while performing his heavy work duties. Claimant urges the Appeals Board to reverse the Administrative Law Judge's award that denied claimant workers compensation benefits. The claimant requests the Appeals Board to affirm the Administrative Law Judge's finding that if this claim is compensable then claimant has proven he is permanently and totally disabled from engaging in any substantial and gainful employment. Claimant requests the Appeals Board to enter an award entitling claimant to permanent total disability benefits in the maximum amount of $125,000.00.[1]

In contrast, respondent contends the Appeals Board should affirm the Administrative Law Judge's award. The respondent argues claimant's heart condition, not related to his employment with the respondent, is the reason claimant can not work and not his alleged work-related low-back condition. Respondent, however, also contends, if the Appeals Board finds claimant proved he suffered a work-related low-back injury, the claim should be denied because claimant failed to provide respondent with timely notice and failed to serve respondent with timely written claim. Respondent further argues claimant failed to prove he's permanently and totally disabled.

Therefore, the issues before the Appeals Board for review are:

1. Did claimant suffer a personal injury by accident that arose out of and in the course of his employment?

2. If so, what is the appropriate date of accident?

3. Did claimant provide timely notice of his accidental injury?

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[1] *See* K.S.A. 44-510c(a)(2) and K.S.A. 44-510f(a)(1).

4. Did claimant serve upon respondent a timely written claim for compensation?

5. If so, what is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board finds the Administrative Law Judge's Award should be reversed and claimant is entitled to a 6.5 percent permanent partial general disability award.

FINDINGS OF FACT

1. The last day the claimant worked for the respondent was September 13, 1996. On that day, claimant was 52 years of age and had been employed by the respondent for over 18 years.

2. Claimant was employed by the respondent in the capacity of maintenance/car repair.

3. Claimant's overall job responsibility was to maintain and repair rail cars that were used to move the uncured bricks through the high temperature tunnel kiln.

4. In order to clean and repair the rail cars, claimant was required to perform the following job duties: (1) sweep the top of the rail cars and the floor surrounding each of the rail cars; (2) repair damaged rail cars by replacing the fire blocks; (3) mix the mud slurry and spread the slurry to secure the fire blocks; (4) scrape the metal on the sides of the rail cars and paint the metal; (5) jack up the wheels of the rail cars and place safety blocks under the cars; (6) oil the wheels of the rail cars after the cars are jacked up; (7) remove the damaged wheel of the rail car; (8) repair the bearings on the rail car wheels after the wheels are removed; (8) place installation between fire blocks; (9) throw away all debris and other trash. These job duties required claimant to stoop, bend, squat, work in awkward positions, and to push, pull, and otherwise lift up to 100 pounds.

5. On September 12, 1996, because of pain in his abdomen and upper back, claimant saw his family physician, T. Scott Webb, D.O. After examining the claimant, Dr. Webb found claimant with epigastric pain, pain in the back at the mid scapula area, and increased gas. Dr. Webb's initial diagnosis was gall bladder disease. The doctor scheduled the claimant for gall bladder testing on September 16, 1996, at the local hospital.

6. The gall bladder test was completed on September 16, 1996, and on either September 17 or September 18 claimant suffered a heart attack. On September 18, 1996, claimant had a bypass surgical operation in Wichita, Kansas. At that time, claimant came under the care of cardiologist Gregory R. Boxberger, M.D. Dr. Boxberger returned claimant to his family physician, Dr. Webb, to monitor claimant's heart medication.

7. Dr. Webb saw claimant on September 30, 1996, for a review of his heart medications and to treat claimant's leg incision which was made to remove a vein for the bypass operation.

8. During claimant's January 10, 1997, visit, Dr. Webb for the first time noted that claimant complained of pain in the right leg from the hip on down. Dr. Webb saw claimant again on January 24, 1997, with more low-back complaints and radicular symptoms to the right hip. Although released to return to light duty on January 13, 1997, by Dr. Boxberger, Dr. Webb keep claimant off work because of his low-back complaints.

Dr. Webb saw claimant again on February 7, 1997, with no improvements in his low-back complaints. Dr. Webb decided, because claimant had not improved, to refer claimant to Vello Kass, M.D., an orthopedic surgeon located in Hays, Kansas.

9. Dr. Kass first saw the claimant on February 10, 1997, at the Russell Regional Hospital. After reviewing the x-rays and examining the claimant, Dr. Kass' initial impression was Type I lumbar pain or degenerative disc disease. He prescribed physiotherapy, lumbosacral corset, and medication. Dr. Kass had claimant undergo an MRI examination on March 10, 1997. The MRI scan showed minor disc bulging at L4-5 and L5-S1 plus L4-5 foraminal stenosis bilaterally.

10. Dr. Kass followed claimant and treated claimant conservatively until January 5, 1998, when he determined claimant had met maximum medical improvement. The doctor determined claimant was not a surgical candidate. In a letter dated February 9, 1998, Dr. Kass assessed claimant with an eight percent permanent functional impairment rating in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (AMA Guides, Fourth Edition). Thereafter, at Dr. Kass' recommendation, claimant participated in a Functional Capacity Assessment (FCA). Based on the FCA, Dr. Kass restricted claimant to light and sedentary work activities. The doctor limited claimant's lifting to 15 pounds. Claimant could work eight hours, but could only sit five to six hours with an interval of only one hour at a time; stand three hours with 30 minutes at a time; and walking was limited to six hours with frequent stops.

11. On the date of the regular hearing, October 22, 1998, respondent had offered claimant a job but claimant could not perform the job because he could not read or write. Claimant was receiving Social Security Disability benefits. Since his last day worked for respondent, claimant had not sought other employment.

12. For the last five years of claimant's employment with respondent, claimant testified he had continuing problems with soreness and pain in his low back as he continued to perform his heavy work activities. Claimant testified he had to stretch and hold his back on occasions as he completed his work shift.

13. As a result of these low-back pains, claimant testified at various times he was treated by a chiropractor, Jay Keller, D.C. Dr. Keller testified that he treated claimant at various times from August 18, 1994, through December 26, 1995. Dr. Keller opined that if claimant was required to perform heavy work activities while working for the respondent those activities would have irritated claimant's low-back condition. After a treatment on May 15, 1995, Dr. Keller restricted claimant from heavy lifting at work until May 19, 1995.

14. Claimant testified he told both his plant manager, Norval Standau, and his supervisor, Eldred Maresch, before he suffered the heart attack, that his back was hurting from performing the heavy work activities and he needed additional help.

15. Claimant's supervisor, Eldred Maresch, testified claimant did complain to him of aching and soreness while he was working. But Mr. Maresch also testified claimant did not specifically tell him he had hurt his back at work. Mr. Maresch did give claimant, on one occasion, an accident report to take home to be filled out because claimant could neither read or write. Claimant, however, did not return the accident report.

16. Dr. Kass was asked during his deposition whether claimant's work activities affected the progress of claimant's degenerative low-back condition. He replied, "it would seem, I would think that would accelerate it, yes." Dr. Kass was further asked whether the work activities would aggravate claimant's degenerative low-back condition. He also replied, "Yes." The doctor went on to testify that his opinion were based on reasonable medical certainty. In a letter to claimant's attorney dated May 15, 1997, Dr. Kass expressed the following:

> In my opinion, lifting, bending, and stooping at the brickyard over a period of 18 years does result in repetitive trauma. This would have an affect on Mr. Hupfer's back problems. As I mentioned in my earlier paragraph, aging and time alone result in degenerative spinal changes leading to stiffness and back pain. However, doing a high stress type of activity as he had been doing for 18 years working in the brickyard would, no doubt, increase stress on the structures of his spine and I think not unreasonably be expected to lead to an accelerated rate of degeneration.

During Dr. Kass deposition testimony, he was asked if the forgoing quote continues to be his opinion and the doctor replied "Yes."

17. Dr. Kass opined, because claimant became deconditioned as a result of inactivity caused by his heart condition, claimant's symptoms due to his degenerative changes in his lumbar spine increased.

18. At respondent's attorney's request, orthopedic surgeon, C. Reiff Brown, M.D., examined and evaluated claimant on December 3, 1998. Dr. Brown took a history from claimant; reviewed previous medical treatment records, x-rays, and MRI scans of claimant's

lumbar sacral spine; and performed a physical examination. The doctor also had claimant undergo a Functional Capacity Evaluation. Dr. Brown's diagnosis was degenerative disc disease in the low-lumbar spine area involving the discs in an early form and also the facets producing a mild to moderate stenosis. In accordance with the AMA Guides, Fourth Edition, Dr. Brown found claimant had a five percent whole body functional impairment.

Respondent provided Dr. Brown with a video that allegedly represented the job duties claimant had to perform while he was working for the respondent. Based on that video, Dr. Brown testified he could not state within a reasonable medical certainty that claimant's work activities had any responsibility for his present symptoms. But the work activities as described to Dr. Brown by the claimant would have caused and accelerated the degenerative changes now present in claimant's lumbar spine.

The doctor went on to opine, if claimant would not have had the heart attack and become deconditioned, there would not have been a change in his functional level. Additionally, Dr. Brown's opinion was that claimant was capable of being reconditioned. He testified, if claimant would simply be required to participate in a rehabilitation program to do some exercises to strengthen his back muscles, claimant could then function at the medium to heavy work category level instead of the light work level.

19. Dr. Webb was also provided, during his deposition, with a general description of claimant's heavy job duties he performed for respondent. Dr. Webb was then asked whether those job duties performed over a period of 18 years would either aggravate or accelerate or intensify claimant's underlying degenerative low-back condition. Dr. Webb replied, "Yes, I think it would have contributed and accelerated in most people."

20. The respondent hired vocational expert Karen Crist Terrill to interview the claimant and to compile a list of claimant's work tasks he had performed in 15 years preceding the last day claimant worked of September 13, 1996. Those work tasks all related to claimant's job he performed as a maintenance/car repair. In addition to interviewing the claimant in reference to his job duties, the respondent also had Ms. Terrill review respondent's video tape of claimant's alleged job duties. Ms. Terrill was then asked what work category would claimant's job duties be placed as observed on the video. Ms. Terrill testified that in her opinion claimant’s job duties would be placed in the heavy or very heavy work categories.

21. Claimant introduced into the record a written claim for compensation that was served by certified mail on the respondent on March 18, 1997.

CONCLUSIONS OF LAW

1. In proceedings under the Workers Compensation Act, the claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which that right depends.[2]

2. The Appeals Board concludes the medical evidence contained in the record, coupled with claimant's testimony, proves claimant's heavy work activities while employed by the respondent aggravated or accelerated the degenerative changes in claimant's low back and made his low back condition worse.

Drs. Webb, Kass, and Brown all testified that claimant's heavy work activities either accelerated or aggravated his degenerative low-back condition. The claimant established through his testimony that he had low-back symptoms while working for at least the last five-year period before his last day worked. During that five-year period claimant had been required to seek chiropractic treatment to relieve the pain and discomfort in his low back.

The Appeals Board is mindful the respondent made an extensive effort to prove the work claimant was required to perform for the respondent was not heavy. But the Appeals Board concludes the record as a whole, including the opinion of respondent's vocational expert, Karen C. Terrill, established that claimant's job duties did place him in the heavy work category. Also, the Appeals Board acknowledges, at the completion of Dr. Kass' testimony, he used the word "speculation" instead of medical probability when he was asked questions concerning whether claimant's back condition would have worsened if claimant had continued to perform the heavy work for respondent. But before Dr. Kass used the word "speculation", he clearly testified, to within a reasonable medical probability, that claimant's heavy work activities accelerated his degenerative low-back condition.

3. The appropriate date of accident for injuries that develop because of repetitive micro-traumas caused by the worker's daily job duties has recently been reviewed by the Kansas Supreme Court.[3]

In Treaster, the Court held that in a micro-trauma injury case the process of determining the appropriate date of accident is simplified and made more certain if the date from which the compensation flows is the last date the claimant performed services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[4]

4. Although claimant had pain and discomfort in his low back, he was able to continue to perform his heavy job duties until his last day worked of September 13, 1996. Even

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[2] *See* K.S.A. 1996 Supp. 44-501(a) and K.S.A. 1996 Supp. 44-508(g).

[3] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

[4] Treaster, Syl. ¶ 3.

though the claimant did not leave work due to his injury, the Appeals Board concludes that claimant's heavy work activities aggravated and accelerated his degenerative low-back condition through his last day worked of September 13, 1996. Thus, in accordance with Treaster, the Appeals Board concludes September 13, 1996, is claimant's appropriate date of accident.

5. The Administrative Law Judge found claimant had not provided respondent with timely notice of accident for a September 13, 1996, accident date. The Workers Compensation Act requires workers to give notice of accident or injury within 10 days of when it occurred. But the 10-day period may be extended to 75 days if the worker can prove that the failure to notify the employer within the initial 10-day period was due to just cause and the employers actual knowledge of the accident or injury renders the giving of such notice unnecessary.[5]

6. The claimant testified, that before his last day worked, he had notified both his supervisor, Eldred Maresch, and the plant manager, Norval Standau, that his heavy work activities were causing him pain and discomfort in his low back and that he needed help. Mr. Standau did not testify and, therefore, claimant's testimony in regard to notice to Mr. Standau is uncontradicted. Claimant's supervisor, Eldred Maresch, did testify and admitted he knew claimant had complaints of soreness and pain as he was working. But Mr. Maresch denied that he knew that the soreness and pain involved claimant's back. The supervisor, however, at one point, testified he gave claimant an accident report to take home to fill out because of claimant's continued complaints. This indicates the supervisor understood those complaints to be work related.

The Appeals Board finds there is no reason contained in the record not to believe claimant's testimony. Therefore, the Appeals Board concludes claimant has proven he provided respondent with notice that his heavy work activities were causing him pain and discomfort in his low back before his last day worked of September 13, 1996.

7. The respondent questioned the Administrative Law Judge's finding that claimant served a timely written claim for compensation upon the respondent. The record contains proof that respondent received a written claim for compensation from claimant on March 18, 1997. Written claim is required to be served upon the respondent within 200 days of the date of accident or within 200 days after the last payment of compensation.[6]

As found above, claimant's appropriate date of accident is September 13, 1996. Therefore, the Appeals Board concludes that claimant served a written claim upon the respondent for compensation within the 200 days as required by statute.

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[5] *See* K.S.A. 44-520.

[6] *See* K.S.A. 44520a.

8. But the medical evidence also establishes that claimant's heavy work activities aggravated or accelerated his degenerative low-back condition and caused claimant to suffer a permanent disability. A worker's preexisting condition that is aggravated by his lifting activities at work and causes permanent disability is entitled to be compensated for the resulting disability.[7]

9. The claimant contends, if this claim is found to be compensable, then the claimant is entitled to a work disability. The Appeals Board, however, concludes the medical testimony in the record established the reason claimant was not working for the respondent is not because of his low-back injury but is because of the heart attack claimant suffered on or about September 18, 1996. Before claimant's heart attack, although claimant had pain and discomfort in his low back, he was able to do the required heavy work duties. Claimant did not leave work because of his low-back injury. The reason he left work was for a personal health condition, the heart attack, and the reason he is unable to return to work is because he became deconditioned during the time he was convalescing from the heart attack.

10. The Appeals Board, therefore, concludes, although claimant is unable to return to work, he is not entitled to a work disability. The reason he is not able to work is because his overall physical condition has deteriorated as the result of a personal heath condition, the heart attack, not associated with the employment. This is analogous to a situation where a claimant has suffered a work-related injury and then suffers increased disability from a non-work related intervening accident. Claimant's increased disability from the intervening accident is not compensable.[8]

Accordingly, the Appeals Board concludes claimant's permanent partial general disability benefits are limited to his permanent functional impairment rating.[9]

11. Both Dr. Kass and Dr. Brown expressed opinions on claimant's functional impairment rating as a result of his low-back injury. As required, both physicians utilized the AMA Guides, Fourth Edition in determining claimant's functional impairment rating. Dr. Kass' opinion was eight percent and Dr. Brown's opinion was five percent. The Appeals Board finds no reason not to give equal weight to both opinions. Therefore, the Appeals Board concludes claimant has a 6.5 percent permanent functional impairment, and he is entitled to a permanent partial general disability award in that amount.

12. The Administrative Law Judge found claimant was temporarily and totally disabled from the date he was released from his cardiologist, Dr. Gregory R. Boxberger, in January

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[7] Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] *See* Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 263, 505 P.2d 697(1973).

[9] *See* K.S.A. 1996 Supp. 44-510e.

1997 until June 11, 1998, when claimant was released by Dr. Kass for his orthopedic problems. The record is somewhat unclear as to the specific date claimant's cardiologist, Dr. Boxberger, released him to return to work. The record does contain a release from Dr. Boxberger for claimant to return to light duty work on January 13, 1997. But claimant was kept off work by Dr. Webb because of his low-back complaints and eventually referred for further treatment to Dr. Kass. Dr. Kass' records indicate that claimant was last seen by him on January 5, 1998, and at that time, it was Dr. Kass' opinion that claimant had met maximum medical improvement. Therefore, the Appeals Board concludes that claimant is entitled to temporary total disability compensation from January 13, 1997, through January 5, 1998.

13. Respondent is ordered to pay all medical costs associated with the treatment of claimant's low-back condition as authorized medical.

14. Future medical shall be provided upon application and approval by the director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bruce E. Moore's May 21, 1999, Award should be, and is hereby reversed and an award of compensation is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Delvin Hupfer, and against the respondent, Kansas Brick and Tile Company, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred September 13, 1996, and based upon an average weekly wage of $564.04.

Claimant is entitled to 51.14 weeks of temporary total disability compensation at the rate of $338.00 per week or $17,285.32, followed by 24.63 weeks of permanent partial compensation at the rate of $338.00 per week or $8,324.94 for a 6.5% permanent partial general disability, making a total award of $25,610.26.

As of July 31, 2000, the entire award is due and owing and is ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to pay all medical costs associated with the treatment of claimant's low-back condition as authorized medical.

Future medical shall be provided upon application and approval by the director.

Unauthorized medical expenses up to the statutory maximum is awarded to the claimant upon proper presentation of the expense.

The respondent is ordered to pay the transcript costs as listed in the Award.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrik W. Neustrom, Salina, KS
C. Stanley Nelson, Salina, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director